Control Over The Defense: Representing Zacarias Moussaoui

And now, the end is near, and so I face the final curtain. My friend, I'll say it clear, I'll state my case, of which I'm certain. … I planned each charted course, each careful step along the byway. But more, much more than this, I did it my way.

— Frank Sinatra, *My Way* (1969).

BY KENNETH P. TROCCOLI

As I began my first week on the job in January 2002 as an assistant federal public defender (AFPD), my new boss, Frank Dunham, Jr., came to me with a problem. His newly appointed client, Zacarias Moussaoui, the so-called "20th hijacker" of the 9/11 attacks, had imposed certain restrictions on the conduct of his defense. These restrictions — which came to be known among those of us on the defense team[1] as the "three Ms" — were: no motions, no mitigation, and no Muslims. That is, Moussaoui, in his *capital* prosecution, had ordered that no motions were to be filed, no mitigation evidence was to be presented, and no Muslims were to be interviewed or summoned as witnesses. Frank asked me to analyze the extent to which Moussaoui could, both constitutionally and ethically, dictate how his case was going to be investigated, prepared, and tried.

Moussaoui's desire to exert control was not necessarily a bad thing — after all, it was his case and his life on the line. And it is healthy for clients to take an active role in their defense. Yet, far too often, clients who insist on doing it "my way" make decisions that bring about the very result — longer periods of incarceration or even death — they profess to want to avoid. Moussaoui is a case in point. He said publicly that he wished to fight the death penalty, yet nearly every significant decision he controlled — including his decision to testify that he was to pilot a fifth plane on September 11 — made death the most likely outcome of his trial. Because the potential consequences of his decisions were so severe, it was extremely difficult for us, his defense team, to allow him, as one public defender put it, "the freedom to be foolish."[2]

Fortunately, most of our appointed clients do not demand the degree of control that Moussaoui did. They are "not as interested in their freedom of choice as they are in their freedom."[3] When the problem of excessive client control does arise, however, hopefully this article will help court-appointed attorneys understand the constraints imposed by the case law and ethical rules. This article draws upon the excellent research of others[4] who, like me, found that, although the cases and rules are clear in some areas, they are muddled or even nonexistent in others.

Part I of this article summarizes the Sixth Amendment right to appointed counsel, including the defendant's right to proceed *pro se*, a right Moussaoui exercised for some 18 months. Part II examines the constitutional dimensions of client control, with an emphasis on Supreme Court and Fourth Circuit case law. Finally,

Part III looks at the Virginia ethical rules that are principally implicated when dealing with a difficult client and the guidance offered by the American Bar Association and the Federal Bar Association on the issue of client control.

I. Sixth Amendment Right To Appointed Counsel

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall … have the assistance of counsel for his defence."[5] Initially, it was thought that this requirement applied only to federal courts and, moreover, that it meant merely that a criminal defendant had the right to employ a lawyer to assist in his defense.[6] It was not until 1932 that this view began to change and "the language of the Sixth Amendment [began expanding] well beyond its obvious meaning."[7]

The change started with the U.S. Supreme Court's 1932 decision in *Powell v. Alabama*, in which the Court, for the first time, interpreted the U.S Constitution, specifically the Sixth and Fourteenth Amendments, to require the appointment of counsel in certain circumstances.[8] In that case, eight indigent African American youths, including Ozie Powell, were found guilty and sentenced to death for raping two white girls in 1931. None of the defendants were definitively represented by counsel. In reversing those convictions, the Supreme Court held that the Sixth Amendment requires that counsel be appointed at state expense to assist an indigent defendant at trial.[9] Finding that "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel," the Court ruled that it was error for the trial court to have failed to appoint specific counsel to assist the defendants.[10]

Six years later, in *Johnson v. Zerbst*, the Supreme Court expanded the right to appointed counsel to include all federal court felony prosecutions.[11] Then, 25 years later in the seminal case of *Gideon v. Wainwright*, the Court extended *Zerbst*'s holding to the states.[12]

In subsequent cases, the Supreme Court has made clear that the Sixth Amendment right to appointed counsel applies only to criminal prosecutions in which actual imprisonment will be imposed.[13] Moreover, it is now clear that the right to appointed counsel extends beyond the trial phase of the criminal case.[14] Such nontrial phases covered by the right, known as "critical stages," include preliminary hearings, court proceedings after formal charges have been filed, and certain pre-indictment procedures, such as lineups.[15] A right to counsel also may exist after the trial, including through completion of a first direct appeal.[16]

Although the Sixth Amendment has been interpreted to guarantee the right to court-appointed counsel, it has not been construed to guarantee the right to a *specific* lawyer.[17] When counsel is appointed, "normally the accused will not be heard to object to the attorney assigned."[18] Indeed, "[c]ourts generally hold that the initial selection of counsel to represent an indigent is a matter resting within the almost absolute discretion of the trial court."[19] This means that an indigent defendant lacks the right to replace his appointed lawyer with other appointed counsel of his choice.[20] By contrast, a defendant who can afford to hire retained counsel, is "guarante[ed] … a fair opportunity to secure counsel of his own choice."[21]

Despite the absence of input from the defendant regarding the choice of appointed counsel, a defendant does have the constitutional right to waive counsel altogether and represent himself.[22] To do so, the defendant must be competent,[23] fully aware of the right being waived, and informed of the "dangers and disadvantages" of waiver.[24] Thus, the waiver must be knowing and intelligent, a determination the trial court must make based on the particular facts and circumstances of the case.[25] Moreover, to be effective, the waiver must be done in a timely manner. As the Fourth Circuit Court of Appeals has held, "'the right to self-representation can be waived by failure timely to assert it, or by subsequent conduct giving the appearance of uncertainty.'"[26] Hence, if a defendant does not assert his right to represent himself until after the beginning of trial, "its exercise may be denied, limited, or conditioned."[27] His right of self-representation also may be denied if it is asserted merely to "manipula[te] … the system," by, for instance, pressing arguments at trial that are irrelevant and frivolous.[28]

If a defendant does exercise his right to self-representation in a timely manner, he needs to be prepared to handle his case alone without the assistance of counsel. The court in its discretion can appoint standby counsel to assist the defendant, but it is not required to do so.[29] Standby counsel even may be appointed "'over objection by the accused.'"[30] In June 2002, when the district court granted Moussaoui's request to proceed *pro se*, it appointed us as standby counsel over Moussaoui's vehement objection. Our appointment was critically important to his defense given that he was not cleared to receive any of the classified discovery, which was voluminous. We remained in that role until we were reappointed as counsel of record in December 2003 when the court revoked Moussaoui's right to self-representation. The basis for the revocation? Moussaoui's failure to adhere to the court's Order not to file "frivolous, scandalous, disrespectful or repetitive pleadings."[31]

Of course, a defendant can accept representation and proceed with counsel, either retained or appointed. Whichever option he chooses, his counsel must be "effective" to satisfy the strictures of the Sixth Amendment.[32] "Effective" counsel does not mean, however, that a defendant has the right to "meaningful" counsel. The Supreme Court made this clear in 1983 when, in *Morris v. Slappy*, it reviewed a ruling by the Ninth Circuit Court of Appeals that the Sixth Amendment right to counsel "include[s] the right to a meaningful attorney-client relationship."[33] The Court summarily rejected any such notion, saying that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney — privately retained or provided by the public — that the court of appeals thought part of the Sixth Amendment guarantee of counsel."[34]

II. Client Control — Constitutional Constraints

The issue of client/attorney control typically arises in criminal cases through a post-trial claim of ineffective assistance of counsel in which the defendant argues that the lawyer did or failed to do some act over which the defendant purportedly had control.[35] It also may arise in the trial court through a motion for substitute appointed counsel when, again, the defendant feels that his attorney has or is exercising erroneous and illegitimate control over some matter.[36] (The same reason may be asserted by a defendant seeking a continuance so as to replace retained counsel.[37]) Despite these differences, courts tend to apply the same reasoning to the control issue irrespective of the vehicle that brought the issue to the court's attention.[38]

Once a defendant chooses to have counsel, whether retained or appointed, he must be able to work with that lawyer to ensure the most successful defense

possible. As discussed below, the case law, although often inconsistent, generally recognizes certain decisions over which the client has control and over which the attorney has control.

A. Decisions Over Which Client Has Control

As a general matter, the client has control over those decisions deemed "personal" or "fundamental."[39] More specifically, according to the Supreme Court, there are five decisions over which a criminal defendant has ultimate control:[40]

- ❖ To plead guilty or take steps tantamount to pleading guilty;
- ❖ To waive the right to a jury trial;
- ❖ To be present at trial;
- ❖ To testify on his own behalf; and
- ❖ To take an appeal.

These decisions amount to "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client."[41] In addition, there are five other decisions that federal and state lower court rulings have found belong solely to the defendant:[42]

- ❖ Waiver of the right to attend important pretrial proceedings;
- ❖ Waiver of the constitutional right to a speedy trial;
- ❖ Refusal (by a competent client) to enter an insanity plea;
- ❖ The decision to withhold a defendant's sole defense at the guilt phase of a capital case and use it solely in the penalty phase; and
- ❖ Waiver of the right to be charged by a grand jury indictment.

The rights to plead guilty and testify figured prominently in Moussaoui's trial. On July 25, 2002, over our strenuous objection, he attempted to plead guilty to four of the six counts of the superseding indictment, exposing himself to the death penalty. The plea broke down after the court determined that he could not admit the essential elements of the alleged conspiracies.[43]

Nearly three years later Moussaoui tried again, this time with more success. On April 22, 2005, the district court, again over our objection, accepted his guilty pleas to all six counts of the superseding indictment.[44] He admitted to conspiring to extort the release of Sheikh Omar Abdel Rahman, otherwise known as the "Blind Sheikh" — who was in federal custody at the time — by threatening to fly a 747 into the White House.[45] He specifically denied being part of the 9/11 conspiracy saying, "[e]verybody know that I'm not 9/11 material."[46] Still later, during testimony he gave over our objection in the first phase of his sentencing trial in March 2006, he changed his story and said that he not only knew many of the 9/11 hijackers, but that his purpose in coming to the United States was to "pilot a plane to hit the White House" on 9/11.[47] His story changed yet again in a sworn affidavit he filed three days after the jury returned a verdict rejecting the death penalty. Writing that his trial testimony about his role in the 9/11 conspiracy was a "complete fabrication," he said he wanted to withdraw his guilty plea "to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001."[48]

B. Decisions Over Which Attorney Has Control

Conversely, the lawyer generally has control over those decisions relating to matters of "strategy" or "tactics."[49] More specifically, the Supreme Court has found the following decisions to be within the control of the attorney:[50]

- ❖ To bar the prosecution from using unconstitutionally obtained evidence;[51]
- ❖ To dismiss the indictment because the grand jury was unconstitutionally selected;[52]
- ❖ To have the defendant wear civilian clothing during the trial;[53]
- ❖ To forego an objection to a jury instruction;[54]
- ❖ To decline to press a particular issue on appeal;[55]
- ❖ To forego cross-examination, to decide not to put certain witnesses on the stand, and to decide not to disclose the identity of certain witnesses in advance of trial;[56]
- ❖ To provide timely discovery to the prosecution;[57]
- ❖ Scheduling matters, including whether to waive the period to proceed to trial under the Interstate Agreement on Detainers;[58]
- ❖ To allow a federal magistrate judge (instead of a district judge) to conduct voir dire and jury selection;[59]
- ❖ To determine what evidentiary objections to raise, including whether to stipulate to the admission of evidence at trial;[60] and
- ❖ To decide whether, after consultation, to concede guilt at the guilt phase of a capital case.[61]

In addition, lower court decisions (federal and state) have found the following to fall within the lawyer's purview:[62]

- ❖ The exercise of peremptory challenges;[63]
- ❖ Bringing juror misconduct to the attention of the trial court;[64]
- ❖ Requesting and/or consenting to a mistrial;[65]
- ❖ Requesting the exclusion of some members of the public from a trial;[66]
- ❖ Seeking a change of venue, continuance, or other relief because of pretrial publicity;[67]
- ❖ Moving for a continuance and/or waiving statutory speedy trial rights where doing so is reasonably justified;[68]
- ❖ Requesting a competency determination;[69]
- ❖ Choosing among different lines of defense that may produce an acquittal;[70] and
- ❖ Deciding what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pretrial motions should be filed."[71]

Although these two lists of lawyer-controlled decisions are short and fairly specific, it is important to bear in mind that the existence of a negative right should imply the existence of a positive one. In other words, the right *not* to take some step presupposes the right *to* take that step. Thus, the lawyer's prerogative to forego cross-examination or

put certain witnesses on the stand naturally implies that the attorney has the power to decide to cross-examine particular witnesses or call particular witnesses to testify. Moreover, it is also logical to assume that the ability to do the specific implies the ability to do the general. Thus, the right of the lawyer to decide whether to move to dismiss the indictment or bar the introduction of unconstitutionally obtained evidence implies the general right to decide whether and which pretrial motions to file.[72] Likewise, the power to decide whether to forgo putting certain witnesses on the stand must, by implication, include the power to choose how many and which prospective witnesses to interview.[73]

Still, the omission of a particular issue from the above two lists does not necessarily mean the client has the ultimate control over how the issue is to be resolved. Indeed, courts are naturally reluctant to expand the number of matters over which a criminal defendant has control. They are reluctant because, among other reasons, waivers of such matters are usually burdensome on the court system, requiring, as they usually do, a knowing, intelligent, voluntary (and sometimes written) waiver in open court on the record.[74]

Along with the power to control a particular decision comes the responsibility that the decision be well-informed. Strategic decisions that are not the product of a thorough investigation will be subject to post-trial attack regardless of counsel's power to make the decision. On the other hand, as the Supreme Court has remarked, strategic decisions made after a thorough factual and legal investigation "are virtually unchallengeable."[75] Put another way, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[76] Tactical decisions will not be justifiable unless defense counsel satisfies this fundamental duty to investigate.[77]

C. Rationale

As already noted, the rationale for deciding whether the client or his counsel has control over a particular matter generally depends on whether the matter is deemed *fundamental/personal* or involves mere *tactics/strategy*. These terms are vague because the boundary between what the defendant controls and what counsel controls is imprecise. Moreover, the Supreme Court has not definitively articulated why some matters fall within the purview of the defendant while others fall within the control of counsel. As Professor LaFave has observed,

> The Supreme Court's explanations of why particular decisions are for counsel or client have been brief and conclusionary. Decisions within the client's control are simply described as involving "fundamental rights," while those within the lawyer's control are said to involve matters requiring the "superior ability of trained counsel" in assessing "strategy."[78]

However, some rationales, in addition to the *fundamental/personal* versus *tactical/strategic* distinction, have emerged from the case law. One of these is the "practical necessities of the adversary system."[79] That system often does not allow for the meaningful consultation and deliberation that a defendant requires in order to fulfill his role as the final decision-maker on a particular issue. As Supreme Court Justice William Brennan observed, "the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial."[80]

Likewise, "practical necessities" include the concern that trial judges will have to expend valuable court time ensuring that defendants knowingly made the decisions to which they have been entrusted. As LaFave has commented,

> [T]he criminal justice process cannot readily require an open court waiver as to all rights that it deems "fundamental." As to many others, the trial judge is hardly in a position to "continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney's every action or inaction that involved any possible constitutional right."[81]

Another rationale draws a distinction between the "ends" and the "means." "The client, it is often said, must be able to control the 'end,' while the lawyer determines the 'means' for reaching that end."[82] The Virginia Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct, discussed in Part III, follow this approach.

Further, courts want to avoid discouraging lawyers from accepting appointed cases, which is what may occur if counsel is not permitted to maintain sufficient control over the conduct of the case. "In the end, this concern of the courts that the lawyer not be forced to sacrifice his professional reputation while providing no true assistance to his client may explain much of the law governing the division of authority between counsel and client."[83]

In sum, the rationales for deciding who has control over a particular matter are myriad and imprecise. Perhaps this is why some courts and scholars employ a balancing test to determine the issue of client control. Such a test was employed by a district court in the Northern District of Illinois in *United States ex rel. Brown v. Warden*, which decided that,

> [T]he amount of client participation required turns on numerous factors, including the stage of the proceedings at which the decision is made, the significance of the legal consequences which attach to the decision, the practical necessities of the adversary system, the degree to which counsel has an adequate opportunity to consult with the client before the decision is made, and the degree to which society has entrusted counsel with a measure of competence to make independent judgments in his role as an advocate.[84]

Finally, where the matter rests with counsel, it generally will not be considered ineffective assistance for the lawyer to fail to consult with the defendant about the matter.[85] Of course, consultation is highly recommended and, as a matter of ethics, may be required (see *infra* Part III). Moreover, except where a breach of ethics is involved, the attorney can always defer to the client's wishes, even on matters within the purview of the attorney.[86] As has been observed,

> A lawyer may conclude that, on balance, it is better to go against his best professional judgment, and in accordance with a client's strongly felt views, than run the risk of a breakdown in lawyer-client communications that would be even more likely to preclude a successful defense.[87]

Deferring to the client under such circumstances will rarely result in a successful claim of ineffective assistance of coun-

sel, even where the client's chosen course of action was ill-advised.[88]

III. Client Control — Ethical Constraints

In addition to the constitutional dimensions of client control, the ethical rules of the various state bars also impose constraints on the court-appointed lawyer. For instance, all lawyers admitted to practice in the Commonwealth of Virginia and all lawyers who practice in the federal district courts in the Eastern and Western Districts of Virginia are subject to the ethical rules established by the Virginia State Bar.[89] These rules are delineated in the Virginia Rules of Professional Conduct (the Virginia Rules), which took effect on January 1, 2000, and which replaced the former Virginia Code of Professional Responsibility.[90] Court-appointed lawyers and retained lawyers follow the same set of rules, that is, "[a]n appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship. …"[91] As the Supreme Court recently stated, "[e]xcept for the source of payment, the relationship between a defendant and the public defender representing him is identical to that existing between any other lawyer and client."[92]

Dealing with difficult clients and, in particular, questions of client control, principally implicate Virginia Rules of Professional Conduct 1.2 (Scope of Representation), 1.14 (Client With Impairment), 1.4 (Communication), 6.2 (Accepting Appointments), and 1.16 (Declining or Terminating Representation).

A. Rule 1.2 — Scope of The Representation

The parameters of a lawyer's authority over the conduct of the case are established by Virginia Rule 1.2, which governs issues of scope. In pertinent part, that rule states:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. … In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer may limit the objectives of the representation if the client consents after consultation.
>
> (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. …
>
> (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.[93]

Comment One to this rule provides further clarification:[94]

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. … At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. *In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.* These Rules do not define the lawyer's scope of authority in litigation.[95]

As the Rule and its Comment state, generally, the client controls the "objectives" and the lawyer controls the "means." Distinguishing between the two, however, as the Bar's Ethics Committee has remarked, "is not always easy."[96]

1. Decisions Over Which Client Has Control

Under the ethical rules, the client controls the "objectives" of the representation.[97] Specifically, Virginia Rule 1.2 lists three decisions that must be made by the client in a criminal case: (1) what plea is to be entered, (2) whether to

waive a jury trial, and (3) whether the client will testify.[98] This list, however, is not exhaustive. As the Ethics Committee of the Virginia State Bar has stated, "Rule 1.2 presents no exhaustive list of decisions that must be made by the client; rather, the rule and its comments provide a standard and guidance for that determination to be made on a case-by-case basis."[99]

In fact, the Ethics Committee, in one of its advisory Legal Ethics Opinions (LEO), has noted that relevant authorities include at least the following nine decisions as falling within the purview of the client:

- ❖ What plea to enter, i.e., whether to plead guilty, not guilty or otherwise;
- ❖ Whether to accept a plea agreement;
- ❖ Whether to waive a jury trial;
- ❖ Whether to testify;
- ❖ Whether to appeal;
- ❖ Whether to be represented by counsel;
- ❖ What types of defenses to present;
- ❖ Whether to submit a lesser-included offense instruction; and
- ❖ Whether to refrain from presenting mitigating evidence at sentencing.[100]

Additionally, the Ethics Committee has advised that any decisions that belong to the client from a constitutional standpoint, also, necessarily belong to the client as a matter of ethics.[101]

2. Decisions Over Which Lawyer Has Control

Conversely, Virginia Rule 1.2 states that the lawyer controls the "means" by which the client's objectives are to be pursued.[102] This includes taking action that is "impliedly authorized to carry out the representation."[103] Other than these vague pronouncements, the Rule does not specify those decisions the attorney is ultimately authorized to make.[104]

The Comments to the Rule, however, offer some guidance. Comment One clarifies that "[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."[105] Comment Six also elaborates that "[t]he terms upon which representation is undertaken may exclude specific objectives or means [including] objectives or means that the lawyer regards as repugnant or imprudent."[106] Finally, Comment One notes that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so … and in many cases the client-lawyer relationship partakes of a joint undertaking."[107]

The Ethics Committee has also provided some guidance through its advisory LEOs. In one of these opinions, the Ethics Committee cited approvingly to a number of federal and state judicial decisions on the issue of client control, and then identified the following seven nonexhaustive "tactical decisions of strategy" as falling within the purview of the lawyer:

- ❖ Which witnesses to call;
- ❖ How to conduct cross-examination;
- ❖ Choice of jurors;
- ❖ Which motions to file;
- ❖ Whether to request a mistrial;
- ❖ Whether to stipulate to easily provable facts; and
- ❖ When to schedule court appearances.[108]

The committee found that the "objectives vs. strategic/tactical" distinction (the former for the client, the latter for the lawyer) drawn in the judicial decisions is consistent with the distinction drawn in the Virginia ethical rules between "objectives" and "means."[109]

3. ABA and Federal Bar Rules

Although not binding on Virginia practitioners, the American Bar Association's "Model Rules of Professional Conduct" and the Federal Bar Association's "Model Rules of Professional Conduct for Federal Lawyers" also offer guidance. Like the Virginia Rules, both the ABA and the Federal Bar adopt the "ends versus means" distinction as the principal rationale for explaining the difference between decisions controlled by the defendant and those controlled by the lawyer.[110] The "objectives of representation" are for the client, and "the means by which they are to be pursued" are for the lawyer.[111]

Specifically, the pertinent part of

the relevant ABA Rule (R. 1.2(a)) is substantively identical to the analogous Virginia Rule. Likewise, the relevant Federal Bar Rule (R. 1.2(a)) is similar in material respects to its Virginia and ABA counterparts, albeit slightly more expansive. It adds "choice of counsel" and "selection of trial forum" to the list of client-controlled decisions, and cites specific examples of some of the tactical choices reserved for counsel, all of which are consistent with the analogous Virginia Rule.[112]

Finally, also comparable to the Virginia Rule is the ABA's 1993 "Standards for Criminal Justice — Prosecution Function and Defense Function."[113] These standards "are intended to be used as a guide to professional conduct and performance,"[114] and, as the Supreme Court has remarked, "[reflect the] [p]revailing norms of practice."[115] Defense Function Standard 4-5.2(a) contains a list of those "fundamental" decisions that should be made by the defendant, and those "strategic and tactical" decisions that should be made by defense counsel.[116] This list is materially identical to the Virginia and Federal Bar rules and even has been cited approvingly by the Virginia State Bar.[117]

B. Rule 1.14 — Client With Impairment

A lawyer's authority to act on behalf of a client under Virginia Rule 1.2 comes with a big caveat. Comment Four to that Rule states: "In a case in which the client appears to be suffering [from a] mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."[118] Rule 1.14 in turn, requires, in pertinent part:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has *diminished capacity*, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[119]

The Comments to Rule 1.14 explain that the ethical rules presume a "normal" attorney-client relationship; that is, one in which the client is "capable of making decisions about important matters."[120] However, when a client suffers from "a diminished mental capacity," then "maintaining the ordinary client-lawyer relationship may not be possible in all respects."[121]

The question then becomes, what is a *diminished mental capacity*? Rule 1.14 defines it as an inability to "make adequately considered decisions" regarding the representation, whether because of "minority, mental impairment or some other reason."[122] Two LEOs further clarify that "diminished mental capacity" exists if the attorney has a "reasonable basis to believe" that the client is unable to "make an informed, rational and stable" decision.[123]

For example, in LEO 1737, the client was a capital defendant who pled guilty and instructed his counsel not to present any mitigating evidence at his sentencing hearing.[124] A psychiatrist found the defendant competent and without any mental impairment. The Ethics Committee advised, "as long as the defendant, in the attorney's judgment, is competent to make an informed, rational and stable choice regarding whether to fight the death penalty with mitigating evidence, the attorney is ethically obligated to respect the client's decision … even if it is contrary to the lawyer's professional judgment and advice."[125]

By comparison, in LEO 1816, a capital client, although found competent by a psychologist, had attempted suicide and expressed a desire to "commit suicide by state."[126] So that the jury would be "more likely to sentence him to death," the client had instructed his trial counsel not to present any evidence or defense during the guilt or penalty phases of the trial.[127] The attorney believed that the client's decision was motivated by his suicidal tendencies. As such, the Ethics Committee opined that the lawyer could disregard the client's instruction so long as he had a "reasonable basis to believe" that the client was unable to "make a rational, stable decision."[128]

If an attorney does have a reasonable belief that the client is impaired, then Rule 1.14 allows the attorney to take reasonably necessary protective action, including seeking further mental health evaluations, seeking the appointment of a guardian, and "going forth with a defense in spite of the client's directive to the contrary."[129] According to LEO 1816, the precise form of "protective action" will depend on "the attorney's conclusion regarding the degree of the client's impairment."[130] Moreover, "protective action" is only appropriate if the client "is at risk of substantial physical, financial or other harm unless action is taken" and the client "cannot adequately act in [his] own interest."[131]

Finally, whatever "protective action" is taken must be consistent with the lawyer's basic ethical duty to zealously advocate on his client's behalf "for the fullest benefit of the client's cause."[132] And the existence of an impairment in no way "diminish[es] the lawyer's obligation to treat the client with attention and respect,"[133] even if that respect is not reciprocated. Moussaoui, for example, referred to his lawyers in his pro se pleadings as "wicked megaloman" (Frank Dunham), "nasty Jewish zealot" (Gerald Zerkin), "right wing racist" (Ed MacMahon), "Japanese kamikaze" (Alan Yamamoto), and "slaves of Dunham" (Anne Chapman and Ken Troccoli).

C. Rule 1.4 — Communication

A lawyer's decision-making authority also is predicated on adequately consulting with the client on "decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."[134] Virginia Rule 1.4 states in pertinent part,

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[135]

This duty to consult is mandatory for both the "objectives" and the "means" of the representation. As stated in Rule 1.2, which must be read *in pari materia* with Rule 1.4, both the objectives and means of the representation can only be pursued "after consultation with the lawyer."[136] Limitation of the objectives of the representation (a decision reserved for the client), also can only be accomplished "if the client consents *after consultation*."[137]

The Comments to Rule 1.4 further explain that the client "should have sufficient information to participate intelligently in decisions" and that the "[a]dequacy of [the] communication depends in part on the kind of advice or assistance involved."[138] For instance, "[i]n litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others."[139] Conversely, "a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail."[140] In sum, the lawyer must,

> [K]eep the client reasonably informed of the status of a matter, to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and to inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.[141]

Moreover, as with Rule 1.2, there is an acknowledgment in Rule 1.4 that a client with an impairment may be treated differently. For example, keeping such a client fully informed "may be impracticable … where the client is a child or suffers from mental disability."[142] Further, the duty to communicate does not prescribe a particular method of communication, for instance a face-to-face meeting or otherwise. In LEO 1791, the Ethics Committee stated,

> [Rule 1.4] in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*.[143]

Finally, the ethical duty to communicate has a constitutional component, for a failure to consult with a client can be a basis for finding that the lawyer provided ineffective assistance of counsel under the Sixth Amendment. As the Supreme Court has stated, "[a]n attorney … has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy."[144]

D. Rules 6.2 — Accepting Appointments and 1.16 — Declining or Terminating Representation

Legendary criminal defense lawyer Edward Bennett Williams — who was retained at rates up to $1000 an hour[145] — was known for insisting on complete control over the conduct of the defense and for declining and/or withdrawing from cases where he did not get it. When, in 1986, he agreed to represent junk bond king Michael Milken, he explained his penchant for complete control by saying, "[if] you get your appendix out you only want one person holding the scalpel."[146] When he later learned that outside counsel from Drexel Burnham were negotiating with the U.S. Attorney, Williams exploded, saying, "[i]f there's no control here I don't want to be involved."[147] And when another high-profile client, Dr. Armand Hammer, the extremely wealthy chairman of Occidental Petroleum, resisted following Williams' advice on pleading guilty, Williams told him, "[t]his is my advice, if you want my advice, take it. If not, I ought to quit the case."[148] Hammer did plead guilty, but when he later denied his guilt in a letter to the probation officer, Williams followed through on his threat and withdrew from the case.[149]

Public defenders and other court-appointed lawyers, of course, do not have the luxury that Williams and other retained lawyers have to leave a case virtually at will. However, the Virginia Rules of Professional Conduct do provide some shelter for lawyers, appointed or otherwise, seeking to avoid or terminate representation of a difficult client. Two rules in particular apply to such situations, Rules 6.2 and 1.16.

1. Rule 6.2 — Accepting Appointments

The Virginia Rules of Professional Conduct impose a responsibility on members of the Bar to render a certain amount of *pro bono* service, which can be satisfied by accepting court-appointed cases.[150] Indeed, the rules appear to presume that a lawyer should accept appointment to a case if asked. More directly, a lawyer's ability to *decline* appointment to a case is qualified. Virginia Rule 6.2 states:

> A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
>
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.[151]

This rule was adopted "because it emphasizes the responsibility of lawyers to increase the availability of legal services by accepting court appointed clients."[152] As such, declining appointment is only permitted for "good cause," which, according to the Comments to the Rule, includes a client "whose cause is unpopular … or … so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[153] Declining appointment also is justified for financial reasons, as when the representation "would impose a financial sacrifice so great as to be unjust."[154] This circumstance might arise, for instance, with a solo practitioner's appointment to a case that is so complex or high-profile that the lawyer's overall legal practice would be devastated because of the time demands of the appointed case.

2. Rule 1.16 — Declining or Terminating Representation

Also qualified is a lawyer's ability to withdraw from representation once appointed. Rule 1.16 enumerates the permissible bases for withdrawal, which, depending on the basis, is either mandatory or permissive. In pertinent part, Rule 1.16 states:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law; [or]
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

* * *

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

* * *

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.[155]

Thus, with respect to difficult clients, withdrawal is *required* if the client demands that "the *lawyer* engage in conduct that is illegal or violates the Rules of Professional Conduct or other law."[156] However, withdrawal is *permitted* if "it can be accomplished without material adverse effect on the client's interests," or "the *client* persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it."[157] Withdrawal is permitted as well "where the client insists on a repugnant or imprudent objective."[158] An example might be when a capital defendant orders his appointed lawyer not to present mitigation evidence at sentencing because his "objective" is to receive the death penalty.[159]

That example nearly arose in Moussaoui's case. As noted, early on Moussaoui ordered us not to present mitigation evidence. However, by the time of the sentencing hearing some four years later, Moussaoui had, for all meaningful purposes, ceased communicating with us. Therefore, we did not have an unequivocal demand from him at that time to pursue an objective (death) that we certainly would have considered repugnant. Moreover, for a number of reasons, it appeared to us that Moussaoui's objective, in fact, was to *avoid* entry of a death verdict. (One source of our belief was Moussaoui himself, who stated at his guilty plea hearing that "I will not apply for death [a]nd, in fact, I will fight every inch against the death penalty."[160]) Finally, mental health professionals we hired had concluded that Moussaoui suffered from schizophrenia, which could have implicated Rule 1.14 (Client With Impairment). Thus, ethically, we felt that we were on solid ground in presenting a mitigation case on Moussaoui's behalf.

If a basis for mandatory or permissive withdrawal exists, the appointed lawyer in court proceedings still must seek "leave of court" before withdrawing from a case. Rule 1.16(c) requires compliance with the "applicable Rules of Court," which in the federal district courts in both the Eastern and Western Districts of Virginia require that certain steps be taken before an appointed attorney may withdraw. Specifically, in the Eastern District of Virginia, the rule is that "[n]o attorney who has entered an appearance in any criminal action shall withdraw such appearance, or have it stricken from the record, except on order of the court and after reasonable notice to the party on whose behalf said attorney has appeared."[161]

Likewise, the rule in the Western District of Virginia requires that once appointed, "the attorney must continue the representation until the matter is closed; until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed pro se; or until the appointment is terminated by court order."[162] If permission to withdraw is denied, then the appointed lawyer must remain in the case, or as Virginia Rule 1.16 states, "a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal."[163]

Moreover, withdrawal from a case can be accomplished through the "constructive discharge" of counsel by the actions of the client. This occurred in the Fourth Circuit case of *United States v. Attar*, when the retained lawyers for the defendant informed the district court at the sentencing hearing that they could not go forward with their sentencing arguments as their client wished to withdraw from his guilty plea. After inquiring of the lawyers and the defendant, the district court permitted Attar's lawyers to withdraw, denied the defendant's request for a continuance, and directed the lawyers to serve as standby counsel.[164] The Fourth Circuit sustained the actions of the district court, saying that the "belated creation by [the] defendant of an inextricable ethical predicament for his counsel" constituted not only a rea-

sonable basis for denying a continuance, but also a "constructive discharge of counsel undertaken for dilatory or unreasonable purposes."[165]

Finally, rather than decline or terminate representation with a difficult client, counsel can choose to remain in the representation despite whatever disagreements exist and abide by the client's informed decision. Under those circumstances, the ABA Defense Function Standards recommend that significant disagreements be memorialized:

> A disagreement between counsel and the accused on a significant decision to be made before or during the trial may be the subject of postconviction proceedings questioning the effectiveness of the lawyer's performance. Rather than leave the matter to be determined on the strength of the memories of the lawyer and client, which are invariably in conflict if the issue arises, some record should be made. This may be accomplished by a memorialization of the nature of the disagreement as to such significant decision, the advice given, and the action taken.[166]

Failure to memorialize the disagreement may constitute evidence of counsel's ethical failure to communicate and consult with the client.[167] Memorialization should be done privately (in the client's file), to safeguard attorney-client communications and to comply with the duty of confidentiality imposed by Rule 1.6 (Confidentiality of Information) of the Virginia Rules. Any public disclosure (in court) of the disagreement should be done in compliance with that rule, which does, for example, permit the disclosure of confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of the client."[168]

IV. Conclusion

Returning to where this article started (with Moussaoui's "three Ms"), I concluded that, Moussaoui's objections notwithstanding, we could file motions, introduce mitigation evidence, and interview and/or call Muslim witnesses in Moussaoui's trial over his objection. Indeed, we had an ethical obligation to do so. My analysis also concluded that, although the case law and ethical rules have delineated areas where either the defendant or attorney have ultimate control, many other areas remain cloudy or unaddressed.[169] Of course, as one scholar points out, "one cannot expect a ruling on each and every decision on which lawyer and client are likely to disagree."[170] Where there is disagreement, counsel can find guidance in the rationales of the cases and rules. Or a balancing test can be employed, like the one used by the district court in *United States ex rel. Brown v. Warden*.[171] For death penalty cases, moreover, defense counsel would do well to remember the ABA's admonition that "extraordinary efforts [should be made] on behalf of the accused."[172]

For his part, Moussaoui fully exercised the "fundamental" rights he enjoyed — pleading guilty against our advice and waiving his right to a jury trial on guilt, testifying on his own behalf against our advice at each of the two phases of his sentencing trial, being present at his trial, and eventually filing an appeal. He even exercised his *Faretta* right to self-representation, relegating us to the role of standby counsel for approximately one and a half years. However, the "fundamental" right he seemed to exercise the most was his right to speak. And speak he did, filing some 200 *pro se* pleadings during the time he was his own lawyer.

It was District Judge Leonie M. Brinkema, however, who had the last word. After sentencing Moussaoui to life behind bars without the possibility of release, she looked squarely at him and said, "[y]ou came here to be a martyr and to die in a great big bang of glory, but to paraphrase the poet, T. S. Eliot, instead, you will die with a whimper. … You will never again get a chance to speak, and that is an appropriate and fair ending."[173]

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Notes

1. The other core members of the team included AFPDs Gerald Zerkin and Anne Chapman, and appointed outside counsel Edward MacMahon, Jr. and Alan Yamamoto. Paralegal/Investigators Pamela Bishop, Michele Jenkins, Linda McGrew, and Sandra Schidlo also played critical roles in the defense.

2. Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 828 (2000).

3. *Id.* at 824.

4. *See* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.6 (3d ed. 2007); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763 (2000); Stephen Schulhofer & David Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993).

5. U.S. Const. amend. VI.

6. *See* JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 at 410 (2003) ("Originally, [the Sixth Amendment right to counsel] was interpreted merely to guarantee that an individual had the right to employ an attorney."); 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW 13-2 (1990 & Supp. 2000) ("Congress enacted two statutory provisions [around the time the Sixth Amendment was adopted] suggesting that this guarantee might be limited to a right to retained counsel."); *see also Scott v. Illinois*, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.").

7. *Nichols v. United States*, 511 U.S. 738, 746 (1994) (stating that by 1979, the Court "had already expanded the language of the Sixth Amendment well beyond its obvious meaning"); *see also* CONG. RESEARCH SER., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1526 (Johnny H. Killian & George A. Costello eds., 2002) ("Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the [Sixth Amendment guarantee of the assistance of counsel] was limited to assuring that a person wishing and able to afford counsel would not be denied that right. It was not until the 1930s that the Supreme Court began expanding the clause to its present scope.").

8. *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *see also* 2 CHESTER J. ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 521 (2d ed. 1997) (noting that prior to *Powell v. Alabama*, "there was no right to an appointed counsel in an indigent case"); 3 RUDSTEIN ET AL., *supra* note 6 at 13-2 (stating that *Powell* was "[t]he first Supreme Court case to address the right of an indigent to appointed counsel"); Brian L. McDermott, *Defending the Defenseless: Murray v. Giarratano and the Right to Counsel in Capital Postconviction Proceedings*, 75 IOWA L. REV. 1305, 1309 (1990) ("The Court in *Powell v. Alabama* first established the right to counsel. …").

9. *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932).

10. *Id.* at 72.

11. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The *Zerbst* Court was unequivocal in its holding that the Sixth Amendment requires that an indigent federal defendant be offered appointed counsel. *See id.* at 467-68 ("Since the Sixth Amendment constitutionally entitles one charged with [a] crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. … If the accused … is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty.").

12. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent criminal defendant in state court is constitutionally entitled to court-appointed counsel at his trial).

13. *See Scott v. Illinois,* 440 U.S. 367, 373 (1979) (holding that "actual imprisonment [is] the line defining the [Sixth Amendment] right to appointment of counsel"); *Nichols v. United States*, 511 U.S. 738 (1994) (reaffirming the holding in *Scott*); *accord Alabama v. Shelton*, 535 U.S. 654, 662 (2002).

14. *See* 2 ANTIEAU & RICH, *supra* note 8 at 524-27 (reviewing the Supreme Court cases stating that under the Sixth Amendment, court-appointed counsel is required during nontrial phases of a criminal prosecution); 3 RUDSTEIN ET AL., *supra* note 6 at 13-38 (listing some of the phases of the criminal case where the right to counsel has been found to be constitutionally required).

15. *See* 3 RUDSTEIN ET AL., *supra* note 6 at 13-46 (stating that the determining factor is whether the phase of the case is a "critical stage" of the proceeding); *see also Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (stating that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [the accused]"); *Rothgery v. Gillespie County*, __ U.S. __, 128 S. Ct. 2578, 2592 (2008) (right to counsel attaches at first appearance before a judicial officer); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (at preliminary hearing); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (after formal charges have been filed); *United States v. Wade*, 388 U.S. 218, 336-37 (1967) (at post-arrest lineup); *Montejo v. Louisiana*, __ U.S. __, 129 S. Ct. 2079, 2085 (2009) (during interrogation). *But see* 2 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 8-11 (3d ed. 1996) (stating that a right to counsel has generally been found not to exist at the evidence-gathering stage).

16. *See, e.g., Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (finding a right to appointed counsel at sentencing); *Douglas v. California*, 372 U.S. 353 (1963) (at the first appeal as of right). *But see Ross v. Moffitt*, 417 U.S. 600, 617-19 (1974) (finding no constitutional right to appointed counsel to pursue discretionary appeals).

17. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."); *accord Montejo v. Louisiana*, __ U.S. __, 129 S. Ct. 2079, 2084 (2009) ("An indigent defendant has no right to choose his counsel. …").

18. 2 COOK, *supra* note 15 at 8-55.

19. 3 WAYNE R. LAFAVE *supra* note 4 at 695; *see also* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 102-103 (1993) ("[V]irtually every American court considering the issue has held that refusal to accept the indigent's choice of counsel is permissible and constitutional. …"). For the reasons for allowing the trial judge to appoint counsel without input from the defendant, *see* 3 LAFAVE ET AL., *supra* at 696-97.

20. 3 LAFAVE ET AL., *supra* note 4 at 703 (stating that an accused "has no right to replace one appointed counsel with another even if that can be done without causing any delay in the proceedings").

21. *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 612 (4th Cir. 1986); *accord United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) ("We have previously held that an element of [the right of counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him.").

22. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that an accused has a constitutional right to represent himself at trial). The right to self-representation also may be protected by statute. *See, e.g.,* 28 U.S.C.A. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. …"). *But cf. Martinez v. Court of Appeal of California,* 528 U.S. 152, 154 (2000) (finding no constitutional right to self-representation on appeal).

23. *See Indiana v. Edwards*, __ U.S. __, 128 S. Ct. 2379, 2385-88 (2008) (discussing competency necessary for a defendant to represent himself at trial); *Godinez v. Moran*, 509 U.S. 389, 400-02 (1993) (discussing competency necessary for a defendant to represent himself to enter a guilty plea).

24. *See* 2 COOK, *supra* note 15 at 8-37 to 8-38 ("For the waiver to be effective, the prosecution must show that the accused was competent to make a waiver and that the accused was fully aware of the right being waived."); *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that before waiving counsel, the defendant must be informed of "the dangers and disadvantages of self-representation").

25. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that the waiver of counsel must be intelligent and intentional and that the court should consider the totality of the circumstances in considering a waiver request); *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver must be knowing and intelligent); *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir.) (noting that waiver of the right to counsel must be done "expressly, knowingly, and intelligently"), *cert. denied*, 522 U.S. 825 (1997).

26. *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997) (quoting *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985)); *see also Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir.) (*en banc*) (stating that invocation of the right to self-representation must be done "clearly and unequivocally"), *cert. denied sub nom., Fields v. Angelone*, 516 U.S. 884 (1995).

27. *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir.) (stating that it was within the power of the district court to deny a request to proceed *pro se* where the request was made on the second day of trial), *cert. denied*, 522 U.S. 825 (1997); *accord United States v. Gillis*, 773 F.2d 549, 559, n.14 (4th Cir. 1985) (noting that "[i]f the right [to self-representation] is not asserted before trial, it becomes discretionary with the trial court whether to allow the defendant to proceed *pro se*"); *United States v. Dunlap*, 577 F.2d 867, 869 (4th Cir.) (holding that a defendant's request to dismiss counsel after the start of the trial may be rejected because of the need "to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"), *cert. denied*, 439 U.S. 858 (1978). Discretion to reject a self-representation request also may exist for other reasons. *See, e.g., Fields v. Murray*, 49 F.3d 1024 (4th Cir.) (*en banc*) (affirming trial court's refusal to allow a defendant to personally cross-examine the minor victims of his alleged sexual assaults), *cert. denied sub nom., Fields v. Angelone*, 516 U.S. 884 (1995).

28. *United States v. Frazier-El*, 204 F.3d 553, 560-61 (4th Cir. 2000) (affirming denial of self-representation request where the defendant wanted to assert that the trial court lacked jurisdiction over him because of his membership in the Moorish Science Temple).

29. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (appointment of standby/"hybrid" counsel is permissible but not required by *Faretta*); *United States v. Singleton*, 107 F.3d 1091, 1100 (4th Cir.) (stating that a court may allow standby counsel, but "the Constitution does not mandate it"), *cert. denied*, 522 U.S. 825 (1997); *see also United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998) (ruling that the district court had broad discretion in deciding the scope of standby counsel's representation where the defendant had voluntarily absented himself from his trial).

30. *United States v. Singleton*, 107 F.3d 1091, 1102, n.9 (4th Cir. 1997) (quoting *Faretta v. California*, 422 U.S. 806, 834, n.46 (1975)), *cert. denied*, 522 U.S. 825 (1997); *accord McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel — even over the defendant's objection — to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals.").

31. *See* Order dated November 14, 2003 (dkt. no. 1120), *United States v. Moussaoui* (E.D. Va. No. 1:01CR455). The district court granted Moussaoui *pro se* status on June 13, 2002, and then revoked it on November 14, 2003.

32. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); *see also Strickland v. Washington*, 466 U.S. 668 (1984) (delineating the standard for "ineffective" assistance).

33. *Morris v. Slappy*, 461 U.S. 1, 10 (1983).

34. *Id*. at 13-14; *accord Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986).

35. 3 LaFave et al., *supra* note 4 at 774 (stating that "probably the most common avenue for presenting [the] issue [of client control, is] … through a claim of ineffective assistance of counsel"); *see also id.* (noting that "questions of client control also may be raised … when an indigent defendant requests appointment of new counsel because his current attorney refuses to accept his directions on an issue that should be within defendant's control. The same ground may be advanced by a defendant seeking a continuance for the purpose of replacing retained counsel.").

36. *Id.* It is important for an indigent defendant to note, however, that he "has no right to a substitute counsel where the disagreement with counsel relates to a matter within the exclusive province of the lawyer." *Id.* at 772 n.6. In other words, "[d]isagreements over 'strategy' do not present 'irreconcilable differences'" for purposes of obtaining new appointed counsel. *Id*. "Thus, the indigent defendant's choice commonly is either to keep the counsel or proceed *pro se*." *Id*.

37. *Id*. at 774.

38. *Id*. at 775 ("Although the difference in procedural setting could conceivably influence a court's analysis of the client-control issue, the courts have tended to treat the issue as basically the same whether presented in one procedural context or another.").

39. *Id*. at 770-74, 796 (noting that counsel generally has to follow the wishes of the client for those decisions "commonly said to require the 'personal choice' of the defendant"); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (referring to the "fundamental decisions" that the defendant has the authority to make); *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998).

40. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is … recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *Taylor v. Illinois*, 484 U.S. 400, 418, n.24 (1988) (citing with approval a decision from the U.S. Court of Appeals for the District of Columbia Circuit stating that the waiver of the right to be present during trial can only be made by the defendant and not the attorney); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *accord* 3 LaFave et al., *supra* note 4 at 776 (listing each of the five decisions and stating that "[t]he Supreme Court has stated, in dictum or holding, that it is for the defendant to decide whether to take each of [these] steps"); *see also United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (citing *Jones v. Barnes*, and stating that "it is the defendant who retains the ultimate authority to decide whether or not to testify"); *United States v. Lawrence*, 161 F.3d 250, 255 (4th Cir. 1998) (ruling that a defendant may waive his right to be present at his trial).

41. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

42. 3 LaFave et al., *supra* note 4 at 776-79 (listing and digesting the supporting authorities).

43. Transcript of July 25, 2002, Plea Hearing at 49-50, *United States v. Moussaoui* (E.D. Va. No. 1:01CR455).

44. Transcript of Apr. 22, 2005, Plea Hearing at 23-24, *United States v. Moussaoui* (E.D. Va. No. 1:01CR455).

45. *Id.* at 28-29.

46. *Id.* at 33.

47. Transcript of Jury Trial (March 27, 2006) at 2311, 2346, *United States v. Moussaoui* (E.D. Va. No. 1:01CR455).

48. Affidavit in support of Defendant's Motion to Withdraw Guilty Plea at paras. 13, 18 (Dkt. No. 1857), *United States v. Moussaoui* (E.D. Va. No. 1:01CR455).

49. 3 LaFave et al., *supra* note 4 at 770-71 (stating that generally, "matters of 'strategy' or 'tactics,' were said to be within the 'exclusive province' of the lawyer"); *see also Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (observing that "[t]he adversary process could not function effectively if every tactical decision required client approval").

50. *See generally* 3 LaFave et al., *supra* note 4 at 779-80 (2007 & Supp. 2008-09).

51. *Wainwright v. Sykes*, 433 U.S. 72, 91 n.14 (1977) (motion to suppress based on a *Miranda* violation); *see also id.* (noting that *Henry v. Mississippi*, 379 U.S. 443, 451 (1965) and *Estelle v. Williams*, 425 U.S. 501 (1976) both hold that the defendant is bound by "decisions of counsel relating to trial strategy").

52. *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973); *Francis v. Henderson*, 425 U.S. 536 (1976).

53. *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976).

54. *Engle v. Isaac*, 456 U.S. 107, 128-29, n.34 (1982).

55. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

56. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

57. *Id.*

58. *New York v. Hill*, 528 U.S. 110, 115 (2000).

59. *Gonzalez v. United States*, __ U.S. __, 128 S. Ct. 1765, 1770-71 (2008).

60. *New York v. Hill*, 528 U.S. 110, 115 (2000); *accord Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). In the Moussaoui trial, the district court judge approved the entry of numerous evidentiary stipulations, none of which were approved by Moussaoui.

61. *Florida v. Nixon*, 543 U.S. 175, 189 (2004). The defendant in *Nixon* had been repeatedly consulted about the decision, but was unresponsive. It is thus not clear how the Court would rule if the client was responsive and objected to the lawyer's decision to concede guilt. *See* 3 LaFave et al., *supra* note 4 at 790.

62. *See generally* 3 LaFave et al., *supra* note 4 at 780-81 (citing and digesting relevant federal and state cases). LaFave also notes that there are a number of other areas in which the courts have expressed uncertainty regarding whether the defendant or counsel has the ultimate say. These areas are: "whether to accept a jury of less than 12, whether to rely upon a partial defense (i.e., a defense that challenges only the higher level of multiple charges), whether to stipulate to the introduction of prior recorded testimony on a critical issue (or all issues), and whether to pursue an 'all or nothing' defense by waiving the right to a jury instruction on lesser included offenses." *Id.* at 782-83 (citing and digesting cases).

63. *Government of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1434 (3rd Cir. 1996) (quoting ABA Standard § 4-5.2(b) which recognizes within counsel's purview the decision to accept or strike jurors); *Gardner v. Ozmint*, 511 F.3d 420, 426 (4th Cir. 2007) (defense counsel's decision not to exercise peremptory challenge was a tactical decision).

64. *Government of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1435-36 (3rd Cir. 1996).

65. Id. at 1435; *United States v. Washington*, 198 F.3d 721, 724 (8th Cir. 1999) ("Common sense … dictates that counsel make the ultimate decision to request a mistrial."); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996) (finding that where "defense counsel consents as a matter of trial strategy to a mistrial, that consent binds the defendant and removes any bar to reprosecution, regardless of whether the defendant participates in the decision").

66. *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 129 (2d Cir. 1969).

67. *United States ex rel. Agron v. Herold*, 426 F.2d 125, 127 (2d Cir. 1970) (holding the decision to waive a pretrial publicity claim is a matter of trial strategy); *State v. Hereford*, 592 N.W.2d 247, 252 (Wis. App. 1999) ("[D]ecisions impacting venue are tactical decisions which are delegated to counsel when a defendant in a criminal trial appears by counsel.").

68. *Townsend v. Superior Court of Los Angeles County*, 543 P.2d 619, 624, 626 (Cal. 1975) (*en banc*) (recognizing that "the power to control judicial proceedings is vested exclusively in counsel" but also acknowledging that counsel does not possess "carte blanche … to postpone his client's trial indefinitely"); *see also New York v. Hill*, 528 U.S. 110, 115 (2000) (counsel has authority to waive Interstate Agreement on Detainers deadline).

69. *People v. Bolden*, 99 Cal. App. 3d 375, 379-80 (1979) ("[W]hen the attorney doubts the present sanity of his client, he may assume his client cannot act in his own best interests and may act even contrary to the express desires of his client."); *see also Shephard v. Superior Court*, 180 Cal. App. 3d 23, 225 Cal. Rptr. 328 (1986).

70. *Lewis v. Alexander*, 11 F.3d 1349, 1352-53 (6th Cir. 1993) (counsel's strategic decision not to raise a medical maltreatment defense did not amount to ineffective assistance of counsel); *Meeks v. Bergen*, 749 F.2d 322, 327-29 (6th Cir. 1984) (counsel's choice of traditional self-defense over battered spouse syndrome); *Hyde v. Branker*, 286 Fed. Appx. 822, 832-33, 2008 WL 2611363 (4th Cir. 2008) (counsel chose not to present a voluntary intoxication defense); *see also Knowles v. Mirzayance*, __ U.S. __, 129 S. Ct. 1411, 1422 (2009) ("The law does not require counsel to raise every available nonfrivolous defense."); *cf. United States v. Kaczynski*, 239 F.3d 1108, 1118 (2001) (declining to decide whether the defendant controlled the decision to present a mental health defense given that he had agreed that his counsel could control the presentation of the evidence).

71. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998) (quoting *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992)); *see also United States v. Wingate*, 128 F.3d 1157, 1161 (7th Cir. 1997) (in retrial, defendant is bound to stipulation agreed to by different counsel in first trial); *United States v. McGill*, 11 F.3d 223, 226-27 (1st Cir. 1993) (affirming defense counsel's decision to stipulate to the admission of evidence over client's objection); *United States v. Kiser*, 948 F.2d 418, 425 (8th Cir. 1991) (not ineffective

assistance for trial counsel to stipulate to admission of business records over defendant's objection); *Johnson v. Riddle*, 281 S.E.2d 843, 846 (Va. 1981) ("The decision to call or not to call a witness [is] a tactical decision to be made by counsel. . . .").

72. *See, e.g., Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998) (holding in a capital case that the decision as to what pretrial motions to file rests with defense counsel).

73. *See, e.g., Lewis v. Alexander*, 11 F.3d 1349, 1353-54 (6th Cir. 1993) (affirming trial counsel's strategic decision not to pursue certain lines of investigation); *Meeks v. Bergen*, 749 F.2d 322, 328 (6th Cir. 1984) (same).

74. *See, e.g., Faretta v. California*, 422 U.S. 806, 835 (1975) (allowing the waiver of the right to counsel so long as it is knowing and intelligent and made on the record); *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (stating that those rights basic to a defendant "cannot [be] waive[d] without the fully informed and publicly acknowledged consent of the client").

75. *Knowles v. Mirzayance*, __ U.S. __, 129 S. Ct. 1411, 1420 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

76. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also Walker v. True*, 401 F.3d 574, 579-80 (4th Cir. 2005) (same), *vacated on other grounds*, 546 U.S. 1086 (2006); *Bell v. True*, 413 F. Supp. 2d 657, 696 (W.D. Va. 2006) (same).

77. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (strategic decision not to present mitigation evidence in capital case was not justifiable given defense counsel's failure to discharge his duty to investigate).

78. 3 LaFave et al., *supra* note 4 at 796 (citing to *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

79. *United States ex rel. Brown v. Warden*, 417 F. Supp. 970, 973 (N.D. Ill. 1976); *accord* 3 LaFave et al., *supra* note 4 at 797 ("The 'practical necessities of the litigation process,' although perhaps not dominant, certainly influence the allocation of control between counsel and client.").

80. *Jones v. Barnes*, 463 U.S. 745, 760 (1983) (Brennan, J., dissenting). Of course, the fact that there is ample time for consultation and deliberation "does not necessarily mean that the decision will be assigned to defendant's control." 3 LaFave et al., *supra* note 4 at 800. In *Jones v. Barnes*, for instance, there was ample time for the lawyer and defendant to choose those issues that would be pursued on appeal. The Court held, however, that it was for the lawyer, not the defendant, to decide which issues would be pursued. *See Barnes*, 463 U.S. at 754.

81. 3 LaFave et al., *supra* note 4 at 800 (quoting *Winters v. Cook*, 489 F.2d 174, 177 (5th Cir. 1973)).

82. 3 LaFave et al., *supra* note 4 at 801 ("Thus, the defendant must control decisions as to whether or not to contest (e.g., whether to plead guilty or take an appeal) and the lawyer will control the defense presentation when it does contest (e.g., whether to introduce particular evidence and whether to raise particular objections to the prosecution's case.").

83. 3 LaFave et al., *supra* note 4 at 803.

84. *United States ex rel. Brown v. Warden*, 417 F. Supp. 970, 973 (N.D. Ill. 1976); *see also United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (*en banc*) (balancing, among other factors, the fundamental nature of the decision and trial strategy to conclude that it is for the defendant to decide whether to testify on his own behalf); 3 LaFave et al., *supra* note 4 at 797 (noting that some courts, including, among others the two foregoing cases, employ a balancing test to decide the issue of client control); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. Cin. L. Rev. 763, 799 (2000) (balancing four factors: "the client's capacity for making an informed choice, the reasons for the client's proposed choice, the degree of harm facing the client, and the likelihood of that harm occurring").

85. 3 LaFave et al., *supra* note 4 at 788 ("In general, the courts have held that where a decision rests with counsel, the lack of consultation with the defendant does not constitute ineffective assistance of counsel."); *cf. Government of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1437 (3d Cir.) (stating that counsel has a reasonable duty to consult "regarding issues on which counsel has the last word"), *cert. denied* 519 U.S. 1020 (1996).

86. 3 LaFave et al., *supra* note 4 at 786.

87. *Id.* at 786-87.

88. *Id.* at 786 (noting that following the client's wishes, provided they are not unethical, "rarely will open the door to a successful postconviction claim of ineffective assistance of counsel based on the attorney's failure to insist upon the attorney's best professional judgment"); *see also* Rodney Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. Cin. L. Rev. 763, 792 n.156 (2000) (citing cases); *Zagorski v. State*, 983 S.W.2d 654, 658-59 (Tenn. 1998) (adhering to the client's demands not to investigate and use in the capital sentencing hearing any family background information did not constitute ineffective assistance of counsel even though those demands may have been ill-advised), *cert. denied* 528 U.S. 829 (1999). *But see Brennan v. Blankenship*, 472 F. Supp. 149, 157-

58 (W.D. Va. 1979) (granting habeas relief where counsel failed to advise their client as to the insanity defense and instead, "allowed themselves to be blindly guided by his uninformed direction").

89. *See* Va. Rules of Prof'l Conduct, R. 8.5(a) (2008-2009) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."); *see also* Local Crim. R. E.D. Va. 57.4(I) & Local Civ. R. 83.1(I) (May 12, 2009) (with one exception not relevant here, adopting the Virginia Rules of Professional Conduct as the governing ethical standards); W.D. Va. Federal R. Disciplinary Enfor. IV.B; Local R. W.D. Va. IV(B) (as amended Nov. 6, 1998) (adopting the Virginia Code of Professional Responsibility "as amended from time to time" as the disciplinary rules of the court, which presumably means that the Virginia Rules govern as they replaced the Virginia Code in 2000); *cf*. W.D. Criminal Justice Act Plan § VIII.B (Apr. 24, 2007) (stating that CJA attorneys must follow the now-defunct Virginia Code of Professional Responsibility). *See also* Rule 6(h) of the Proposed Local Rules of the W.D. of Virginia (Nov. 6, 2009).

90. The Virginia Rules of Professional Conduct were adopted January 25, 1999, and became effective January 1, 2000. *Id*. ("Editors Note" preceding Preamble); *see also Motley v. Virginia State Bar*, 536 S.E.2d 97, 99 n.2 (Va. 2000) (noting that the Virginia Rules replaced the Virginia Code of Professional Responsibility).

91. Va. Rules of Prof'l Conduct R. 6.2 cmt. 3 (2008-2009).

92. *Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, 1291 (2009) (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (internal quotation marks omitted); *see also id*. ("'[O]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'") (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981)).

93. Va. Rules of Prof'l Conduct 1.2 (2008-2009).

94. The Comments to the Rules "are interpretive," that is, they "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Va. Rules of Prof'l Conduct, Preamble (Scope) (2002), Va. Sup. Ct. R. Pt. 6, § II; *accord In re Johnson*, 2008 WL 183342, *5 n.6 (Bankr. E.D. Va. 2008).

95. Va. Rules of Prof'l Conduct 1.2 cmt. 1 (2008-2009) (emphasis added).

96. Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *6 (Aug. 17, 2005).

97. Va. Rules of Prof'l Conduct 1.2(a) (2008-2009); *accord* Va. State Bar Legal Ethics Opinion No. 1737 n.2 (Oct. 20, 1999) ("Virginia Rules of Professional Conduct … require[ ] an attorney to 'abide by a client's decisions concerning the objectives of representation.'") (quoting R. 1.2).

98. Va. Rules of Prof'l Conduct 1.2(a) (2008-2009).

99. Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *6 (Aug. 17, 2005).

100. *Id*. at *6-*10 (quoting from the "ABA Standards for Criminal Justice — Prosecution Function and Defense Function," Defense Standard 4-5.2 (Control and Direction of the Case) and citing to state and federal cases); *see also* Va. State Bar Legal Ethics Opinion No. 1737 (Oct. 20, 1999) (advising that, in a capital case, a lawyer is ethically obligated to respect a client's decision not to present any mitigating evidence at the sentencing hearing so long as the client, in the attorney's judgment, "is competent to make an informed, rational and stable choice regarding whether to fight the death penalty with mitigating evidence"); Va. State Bar Legal Ethics Opinion No. 1823 (Jan. 10, 2006) (advising that a state assistant public defender violates the ethical rules if he waives a jury trial on behalf of a client who has not been in contact with the lawyer).

101. Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *3 n.1 (Aug. 17, 2005) ("A distinction can be made between the questions of what decisions should all attorneys leave to their clients to comply with Rule 1.2's concept of scope and what decisions must any defense attorney leave to a criminal defendant to preserve that client's constitutional protections. This opinion addresses the first question, but of course any decisions of the latter variety would necessarily come within the category established by the first question.") (citing *Jones v. Barnes*, 463 U.S. 745 (1983)).

102. Va. Rules of Prof'l Conduct 1.2(a) (2008-2009).

103. *Id*. at Rule 1.2(d).

104. *Cf. id*. Rule 1.2(b) (allowing the lawyer to "limit the objectives of the representation if the client consents after consultation"); *accord* ABA Model Rules of Prof'l Conduct 1.2(c) (2009); Fed. Bar Ass'n Model Rules of Prof'l Conduct for Federal Lawyers 1.2(c) (1990).

105. Va. Rules of Prof'l Conduct 1.2 cmt. 1 (2008-2009). The Comment also makes this rather vague statement: "These Rules do not define the lawyer's scope of authority in litigation." *Id*.

106. *Id*. at cmt. 6.

107. *Id*. at cmt. 1.

108. Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *8-*10 (Aug. 17, 2005) (citing state and federal cases).

109. *Id*. at *8.

110. *See* 3 LaFave et al., *supra* note 4 at 801 (citing Rule 1.2 of the ABA Model Rules as an example of the "ends versus means" rationale).

111. *Cf*. Va. Rules of Prof'l Conduct 1.2(a) (2008-2009) *with* ABA Model Rules of Prof'l Conduct 1.2(a) (2009) and Fed. Bar Ass'n Model Rules of Prof'l Conduct 1.2(a) (1990). The Federal Bar Rules are somewhat dated. They were adopted in 1990 and have not been updated since.

112. *Cf*. Fed. Bar Ass'n Model Rules of Prof'l Conduct 1.2(a) (1990) *with* Va. Rule 1.2 and Va. LEO 1816.

113. ABA "Standards for Criminal Justice — Prosecution Function and Defense Function" (3d ed. 1993).

114. *Id*. at Stnd. 4-1.1.

115. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

116. ABA "Standards for Criminal Justice — Prosecution Function and Defense Function," Stnd. 4-5.2(a) (3d ed. 1993); *see also* 3 LaFave et al., *supra* note 4, at 771 (stating that the 1971 version of this Standard, which, for all intents and purposes, is identical to the 1993 version, "basically restated the case law as it existed prior to *Faretta [v. California*, 422 U.S. 806 (1975)]").

117. *See* Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *7-8 (Aug. 17, 2005).

118. Va. Rules of Prof'l Conduct 1.2 cmt. 4 (2008-2009).

119. Id. at Rule 1.14(a), (b) (emphasis added).

120. *Id*. at cmt. 1.

121. *Id*. at cmt. 1.

122. Id. at Rule 1.14(a).

123. Va. State Bar Legal Ethics Opinions Nos. 1737 at 2 (Oct. 20, 1999) and 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, at *13 (Aug. 17, 2005).

124. Va. State Bar Legal Ethics Opinion No. 1737 at 1 (Oct. 20, 1999).

125. *Id*. at 2.

126. Va. State Bar Legal Ethics Opinion No. 1816, 2005 Va. Legal Ethics Ops. LEXIS 5, *1 (Aug. 17, 2005).

127. *Id*. at *1.

128. *Id*. at *13.

129. *Id*.

130. *Id*.

131. Va. Rules of Prof'l Conduct 1.14(b) (2008-2009).

132. *Id*. at Rule 3.1 cmt. 1.

133. *Id*. at Rule 1.14 cmt. 2.

134. *Id*. at Rule 1.4 cmt. 5.

135. *Id*. at Rule 1.4(a), (b).

136. *Id*. at Rule 1.2(a). The Model Rules from the ABA and the Federal Bar

Association contain similar requirements. *See* ABA Model Rules of Prof'l Conduct 1.2 (2009); Fed. Bar Ass'n Model Rules of Prof'l Conduct 1.2 (1990). The ABA Defense Function Standards likewise require consultation with the client to facilitate his decision on the entry of a plea, waiver of jury trial, and the like. *See* ABA "Standards for Criminal Justice — Prosecution Function and Defense Function," Stnd. 4-5.2 (3d ed. 1993). With respect to consulting about strategy and tactics, however, the Defense Function Standards are less rigid than the analogous provisions of the Virginia, ABA, and Federal Bar Rules. Consultation with the client is still required on such matters, but only "where feasible and appropriate." *Id*. at (b). The Commentary to the applicable Standard explains that "[n]umerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation." *Id.* Commentary, "Strategy and Tactics."

137. Va. Rules of Prof'l Conduct 1.2(b) (2008-2009) (emphasis added).

138. *Id*. at Rule 1.4 cmt. 5.

139. *Id*.

140. *Id*.

141. Va. State Bar Legal Ethics Opinion No. 1817, 2005 Va. Legal Ethics Ops. LEXIS 6, at *2-*3 (Aug. 17, 2005).

142. Va. Rules of Prof'l Conduct 1.4 cmt. 6 (2008-2009).

143. Va. State Bar Legal Ethics Opinion No. 1791 at 2 (Dec. 22, 2003) (emphasis in original) (advising that a lawyer's duty to communicate under Rule 1.4 includes a duty to notify the client of a missed appeal caused by the fault of the lawyer).

144. *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (finding that trial counsel had a duty to consult with his client about whether to concede guilt at the guilt phase of a capital case); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (stating that defense counsel has a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution").

145. Evan Thomas, THE MAN TO SEE: EDWARD BENNETT WILLIAMS ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER Photo Caption 7 (1991).

146. *Id*. at 474.

147. *Id*.

148. Robert Pack, EDWARD BENNETT WILLIAMS FOR THE DEFENSE 21 (2d ed. 1988).

149. *Id*. In another example, Williams declined the representation of pediatrician and political activist Dr. Benjamin Spock, who was charged with conspiracy related to his demonstrations against the Vietnam War. *Id*. at 361. "It was quite clear that I would never get the kind of control over that case that I insist upon," Williams declared. *Id*. Williams believed that Spock and his co-defendants did not want to defend themselves against the charges, but instead, wanted to use the trial "as a vehicle for articulating their antiwar feelings." *Id*.

150. *See* Va. Rules of Prof'l Conduct 6.1, 6.2 cmt. 1 (2008-2009).

151. *Id*. at Rule 6.2.

152. *Id*. at Rule 6.2 "Committee Commentary."

153. *Id*. at Rule 6.2 cmt. 2. Although lawyers are permitted under the Rules to decline an appointment, most court-appointed lawyers rightly believe that it is imprudent to decline a request from the court to accept a case no matter how difficult the client or the case may be.

154. *Id*.

155. Va. Rules of Prof'l Conduct 1.16 (2008-2009). The ABA Model Rules and the Federal Bar's Rules provide for similar bases for withdrawal from a case. *See* ABA Model Rule 1.16 and Fed. Bar Ass'n Model Rule 1.16.

156. Va. Rules of Prof'l Conduct 1.16 cmt. 2 (2008-2009) (emphasis added).

157. *Id.* cmt. 7 (emphasis added).

158. *Id*.

159. For a list of the cases and commentators advocating for and against allowing a capital defendant to decide whether mitigation evidence should be presented, see Rodney Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 829 n.300 (2000).

160. Transcript of Apr. 22, 2005 Plea Hearing at 26, *United States v. Moussaoui* (E.D. Va. No. 1:01CR455).

161. Local Crim. R. E.D. Va. 57.4(G) (May 12, 2009).

162. W.D. Criminal Justice Act Plan § VIII.D (Apr. 24, 2007); *cf.* W.D. Standing Order III.B.1 Governing the Admission of Attorneys ¶ 8 (Apr. 21, 2008) ("No attorney of record shall withdraw from any cause pending in this court, except with the consent of [the] client stated in writing or by consent of the court for good cause shown."). *See also* Rule 6(i) of the Proposed Local Rules of the W.D. of Virginia (Nov. 6, 2009).

163. Va. Rules of Prof'l Conduct 1.16(c) (2008-2009).

164. *United States v. Attar*, 38 F.3d 727, 730, 733 (4th Cir. 1994).

165. *Id*. at 735; *cf. United States v. Garey*, 540 F.3d 1253, 1265 (11th Cir. 2008) (holding that an uncooperative defendant can waive his right to counsel by rejecting the lawyer whom the trial court has appointed); *cf. Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, 1292 (2009) (rejecting the defendant's claim of a speedy trial violation where some of the delays were caused by the defendant's "deliberate attempt to disrupt proceedings," including his "deliberate efforts to force the withdrawal of [appointed counsel]" shortly before trial).

166. ABA "Standards for Criminal Justice — Prosecution Function and Defense Function," Stnd. 4-5.2, Commentary, "Record of Advice" (3d ed. 1993).

167. *See, e.g., Brennan v. Blankenship*, 472 F. Supp. 149, 157 (W.D. Va. 1979) (concluding from the "absence of [any] record" that trial counsel failed to advise their client on the availability of an insanity defense), *aff'd* 624 F.2d 1093 (4th Cir. 1980); *see also Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) (criticizing the defense attorneys' uninformed decision to accept their client's request not to call any witnesses at the mitigation phase of his capital trial).

168. Va. Rules of Prof'l Conduct 1.6(b)(2) (2008-2009).

169. The author has prepared a summary chart (available upon request) listing the decisions controlled by the client and the lawyer.

170. 3 LAFAVE ET AL., *supra* note 4 at 784.

171. *United States ex rel. Brown v. Warden*, 417 F. Supp. 970, 973 (N.D. Ill. 1976).

172. American Bar Association, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Defense Standard 4-1.2(c) (3d ed. 1993). A potentially useful source for constitutional and/or ethical guidance on the issue of client control in capital cases is the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The ABA recommends that all capital counsel comply with these guidelines.

173. Transcript of May 4, 2006, Sentencing at 21, *United States v. Moussaoui* (E.D. Va. No. 1:01CR455). ■

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